

REMARKS

Reconsideration of this Application as amended is respectfully requested. This AMENDMENT AND REPLY AFTER FINAL REJECTION is filed in response to the Office Action made Final mailed February 10, 2006 (the "present Office Action"). Claim 27 has now been canceled and Claims 6-14 have previously been canceled, the foregoing without prejudice or disclaimer. Claim 28 has been amended to correct the stating of dependency. Claims 1-5 and 15-26 and 28-37 are pending in the application, with claims 1, 15, and 32 being the independent claims. Based on these Remarks, Applicant respectfully requests that the Examiner reconsider all outstanding objections and rejections and that they be withdrawn.

Rejections under 35 U.S. C. § 112, second paragraph

The present Office Action rejected pending claims 27 and 28 under 35 U.S.C. § 112, second paragraph respectively, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. In this regard the structure of claim 27 is stated to contradict the limitation of claim 1 setting forth the gripping member as being recessed within the spout. Claim 28, being dependent upon claim 27 suffers the same infirmity. Applicant has cancelled claim 27 thereby rendering the rejection thereof moot. Applicant has currently amended claim 28 to now depend upon independent claim 1.

Rejections under 35 U.S. C. § 103**Claims 1-5 and 15-26 and 28-37**

The Examiner has rejected claims 1, 3, 5, 26, 29, 31-32, 34 and 36-37 under 35 U.S.C. § 103 as being unpatentable over U.S. Patent No. 5,839,627 to Hicks et al. ("Hicks") in view of the newly cited reference of U.S. Patent No. 4,756,443 to Murayama.

The present Office Action acknowledges that the Hicks fitment "does not expressly disclose a semi-circular member having first and second ends with the second end unconnected

to the frangible membrane as called for in Applicant's independent claim 1." Yet, the present Office Action cites to a statement in Hicks at column 5 lines 4-6 that a gripping member can have other desired shapes including a "tab or handle or any other protrusion suitable for grasping".

The newly cited reference of Murayama is applied for a teaching that "it is known to provide a gripping member as a ring (49) or a semi-circular (35) tab member". The present Office Action then posits that it would have been obvious to one of ordinary skill in the art to form the Hicks gripping member in a semi-circular (claim 1, 32) or helically (claim 34) shape having first and second ends with the second end unconnected to the frangible membrane as taught by Murayama "since such a modification would have involved a mere change in the shape of a component. A change in shape is generally recognized as being within the level of ordinary skill in the art. Doing so provides a gripping member of known alternative configuration". With respect to claims 32 and 26, the present Office Action asserts it would have been an obvious manner of design choice and optimization to provide the semicircular member with an extension of approximately 180° and 270° respectively.

Applicant initially notes that no singular reference has been cited as anticipating Applicant's claimed invention. Unpatentability for anticipation under 35 U.S.C. § 102(b) requires that all of the elements and limitations of the claim be found within a single prior art reference. Carella v. Starlight Archery and Pro Line Co., 804 F.2d 135, 138, 231 USPQ 644, 646 (Fed.Cir.1986); RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed.Cir.1984).

Applicant respectfully traverses the rejections of claims under 35 U.S.C. § 103(a) as the same may be attempted to be applied to Applicant's independent claims 1 and 32 upon which all remaining pending claims directly or indirectly depend.

Applicant respectfully submits that the cited and applied Hicks and Murayama references herein are not properly combinable in the manner asserted in the present Office Action and even if the combination were attempted, the same does not reconstruct Applicant's invention as claimed in independent claims 1 and 32.

No Recreation of Applicant's Claimed Invention.

Addressing the latter argument first - that the attempted Hicks and Murayama combination does not reconstruct Applicant's claimed invention - it is noted that both independent claims 1 and 32 in part defines a fitment comprising a gripping member adapted to facilitate removal of the frangible membrane from the spout, **the gripping member including a semicircular member having first and second terminal ends, the first end being connected to the frangible membrane adjacent the line of weakness, and the second end being remotely located from the first end and unconnected to the frangible membrane**; wherein the frangible membrane and the gripping member are monolithically formed **and the semicircular member is either recessed within the spout (claim 1) or extends at least approximately 180° (claim 32).**

Applicant respectfully submits that the attempted combination of Hicks and Murayama do not reconstruct the bold print portions of the independent claims set forth above.

While the Hicks patent discloses column 5 lines 4-6 at that **pull device 30** "may be a ring or tab or handle or any other protrusion suitable for grasping by the user", the Hicks patent fails to disclose that its pull device may be **semicircular**. The present Office Action acknowledges that the Hicks patent fails to teach or suggest "a semi-circular member".

Nor does the Hicks patent teach or suggest such a pull device having **an open configuration with an inner and outer diameter**. Instead, Hicks discloses a tab 30 attached to a top surface 28 of an inner membrane seal 20. Tab 30 disclosed by Hicks is depicted as having a

closed ring-shape in all the figures. The closed ring shape disclosed by Hicks is distinct from an open semicircle shape both in appearance and in function, both when resting and when being pulled by a user. Indeed, Hicks teaches at Column 5, lines 25-31, that the inner membrane seal 20 "may be removed from the inside of the spout by **either pulling the tab 30 upwardly or pushing it downwardly** (in a direction opposite to arrow 21) to produce an aperture which was previously occupied by the inner membrane seal 20" {bold print emphasis added}. To operate downwardly the pull tab 30 of Hicks is as depicted, namely of **a closed configuration**. Hicks fails to disclose an open configuration.

Nor does Hicks teach or suggest "**a semi-circular member having first and second terminal ends**" as in the fitment of the present invention with a gripping member including a *semicircular member having first and second terminal ends*, as is called for by claims 1 and 32.

Nor does Hicks teach or suggest "**the first end being connected to the frangible membrane adjacent the line of weakness, and the second end being remotely located from the first end and unconnected to the frangible membrane**".

According to the present Office Action, the foregoing aspects of the present invention not taught by Hicks are taught by Murayama via a gripping member as a ring (49) or a semi-circular (35) tab member. However, the attempted modification of Hicks by Murayama would not reconstruct Applicant's claimed invention.

Murayama is directed to a pressure-packing container comprising an impervious container body having an internally recessed upper edge, and an easy-to-open closure cap composed of a rigid outer closure member having an annular rim, a resilient inner closure member joined with the underside of the outer closure member, and a sheet of impervious film bonded with the inner closure member. To close the container, an inner peripheral wall of the rim is plastically deformed to force a portion of the inner closure member to flex into a groove in the

upper edge, with an outer edge of the impervious film sheet sandwiched between the deformed inner closure member and the grooved upper edge, thereby providing a hermetic seal strong enough to withstand the inside pressure of the container.

FIG. 1 of Murayama is a plan view of a closure cap 11 of its pressure-packaging container.

With respect to the asserted semi-circular pull tab member 35, Murayama teaches:

"As shown in FIG. 1, the closure cap 11 further includes a **pull tab 35** disposed on an outer obverse side of the outer closure member 21 for detaching the closure cap 11 from the container body 10. **The pull tab 35 is integrally connected with an annular strips 36 disposed in the recessed intermediate portion 25 of the outer closure member 21. The annular strip 36 in turn is integrally connected with the resilient inner closure member 22 by means of a plurality of connectors 37** (FIG. 4) extending through the respective apertures 28 and the through-hole 27. The connector 37a extending through the through-hole 27 is thicker than the other connectors 37 and hence is stronger than the latter. **The pull tab 35, the strip 36 and the connectors 37, 37a are composed of the same material as the inner closure member 22** and they are formed simultaneously with the formation of the molded inner closure member 22."... {Column 4, lines 33-49, bold print emphasis added}

"To open the container of FIG. 5, **the pull tab 35 is gripped by the user's fingers and pulled upwardly away from the closure cap 11 to thereby forcibly separate the strip 36 from the successive connectors 37. Since the last connector 37a is thicker than the remainder 37 and hence withstands the pulling force, the pull tab 35 is still in integral connection with the inner closure member 22. As the pull tab 35 is further pulled, the outer closure member 21 is separated from the inner closure member 22, followed by detachment of the inner closure member 22 from the upper edge 15 of the container body 10. In this instance, the closure cap 11 is snapped out from the container body 10 under the force of the pressurized gas in the container. The upper edge 15 of the container body 10 is free from damage and hence is reusable after cleaning.**" {Column 5, lines 43-58, bold print emphasis added}

The Murayama pull tab 35 **thus encompasses a portion which connects with the annular strip 36 – a portion which is inconsistent with the total pull tab 35 being "semicircular"**. Specifically, FIG. 1. illustrates the pull tab 35 as having a generally linear proximal portion connected to the annular strip 36 and an abbreviated flared free end

apparently having a mildly acuate contour. As an integral whole, the pull tab 35 distinctly is not "semicircular".

Moreover, the gripping surface to be gripped by a user's fingers is expressly stated to be "the pull tab 35" **inclusive of its generally linear proximal portion connected to the annular strip 36.**

FIG. 6 of Murayama is a plan view of a modified closure cap 41. At Column 6 lines 13-31 Murayama teaches:

"The closure cap 41 of the foregoing construction is attached to the upper edge 15 of the container body 10 in the same manner as the closure cap 11 of FIG. 1 has done, therefore, a description is not necessary. **When the closure cap 41 is to be detached from the container body 10, the flap 46 is lifted up to move a portion of the rim 44 upwardly away from the corresponding slit grip portion 44 of the inner closure member 42. As the flap 46 is further lifted, the inner closure member 42 and the impervious film sheet 48 are brought out of sealing engagement with the grooved upper edge 15 of the container body 10. In this instance, a pressurized gas leaks from the container through the slits 47. A further upward movement of the flap 46 necessarily causes detachment of the closure cap 41 from the container body 10. Alternately, it is possible to open the container by pulling a pull tab 49 on the closure cap 41, in advance to the lifting of the flap 46.**" {bold print emphasis added}

Thus, usage of the pull tab 49 is an alternate means to open the container than that of flap 46. Employment of this alternative means still entails pulling the pull-tab 49 in like manner as in the pull tab 35 to accomplish the alternate opening with like structure as in the earlier closure cap 11. The Murayama pull tab 49 **also encompasses a portion which connects with the annular strip 36 – a portion which is inconsistent with the total pull tab 49 being "semicircular".** FIG. 6. illustrates the pull tab 49 as having a generally linear proximal portion connected to the annular strip 36. As an integral whole, the pull tab 49 is distinctly not "semicircular".

In order to recreate Applicant's claimed semicircular member of independent claims 1 and 32, the present Office Action's attempted modification of Hicks by Murayama **must dissect out**

the linear proximal portion of the pull tab 35 or 49 that is connected with the annular strip 36 which in turn is integrally connected with and operable with the resilient inner closure member 22 via the plurality of successive connectors 37.

Not only would such a dissection be improper since references are to be considered in their whole, but also such a dissection would render inoperable the stated purpose of opening the closure cap because **the linear proximal portion of the pull tab 35 or 49 must be connected with the annular strip 36 to open the closure cap.**

Thus, no motivation exists for either such a dissection or for the attempted combination of Hicks with Murayama due to the inoperability.

Even if the foregoing were ignored, such an attempted dissection would necessarily be based upon hindsight gained from Applicant's inventive disclosure.

Finally, the dissected distal end portion of the pull tab 35 does not form a semicircular member. **The distal end portion is an abbreviated flared free end of the pull tab 35, not a semicircular member. The mildly acruate contour depicted does not have sufficient arc.**

Likewise dissecting out the distal ring portion of Murayama's pull tab 49 for incorporation into the Hicks tab 30 would require modification be configured as a semicircular member as disclosed in independent claims 1 and 32. A ring shape forms a continuous form with no ends. In contrast, the semicircular member disclosed in independent claims 1 and 32 has *first and second terminal ends*, the second end being remotely located from the first end.

Hicks and Murayama Are Not Properly Combinable.

The Hicks and Murayuma references are improperly combined and applied for at least three reasons.

First, a prior patent must be considered in its entirety, i.e., as a whole, including portions that would lead away from the invention in suit. W.L. Gore & Associates, Inc. v. Garlock, Inc.,

721 F.2d 1540, 1550, 220 USPQ 303, 313 (Fed.Cir.1983), cert. denied, 469 U.S. 851, 105 S.Ct. 172, 83 L.Ed.2d 107 (1984). The Court of Appeals for the Federal Circuit in the case of Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1568, 1574, 1 USPQ2d 1593 (Fed.Cir.), cert. denied, 481 U.S. 1052 (1987) stated that it is error to "focus on isolated minutiae in a prior art patent while disregarding its scope, i.e. its entire disclosure, and how its disclosed structure works".

Second, it is the claimed invention as a whole that must be obvious to a person of ordinary skill in the art under the §103 inquiry. The mandate of §103 is that "the invention as a whole must be considered....[This] embraces the structure, its properties, and the problem it solves." In re Wright, 848 F.2d 1216, 1219, 6 USPQ2d 1959 (Fed.Cir.1988); Diversitech Corp. v. Century Steps, Inc., 850 F.2d 675, 678-79, 7 USPQ2d 1315 (Fed.Cir.1988).

Third, to render an Applicant's invention obvious, there must exist a motivation or reason for the worker in the art, without the benefit of Applicant's specification, to make the necessary changes in the reference cited. Modifying a reference in light of Applicant's disclosure is clearly improper. Ex parte Chicago Rawhide Manufacturing Company, 226 USPQ 438, 440 (PTAB 1984).

Additionally, there is no motivation to modify the tab 30 of Hicks to use a semicircular member. Even if a change of shape is within the level of ordinary skill in the art, the present Office Action has failed to point to specific motivation in Hicks or Murayama for modifying the closed ring-shaped tab 30 to use a semicircular shape versus a ring. A pull-tab as disclosed by Hicks is **pulled upwardly or push downwardly** by a user with a single finger. In contrast, a gripping member having first and second terminal ends, as disclosed in claim 1, requires pulling up the gripping member with a finger and then grasping the member between at least two fingers.

Hicks fails to include any motivation for configuring closed tab 30 in such an open semicircular shape as disclosed in independent claims 1 and 32..

Likewise one skilled in the art would not modify Hicks by Murayama as applied in the present Office Action. Murayama's **linear proximal portion of the pull tab 35 or 49 must be connected with the annular strip 36, and hence the plurality of successive connectors 37 and the resilient inner closure member 22, to open the closure cap.** A modification selectively disregarding the linear proximal portion of the Murayama pull tabs 35 or 49 destroys the cap's operability to open.

Advantages of Applicant's Claimed Invention.

As previously discussed in several previous amendments and most recently in the *AMENDMENT AND REPLY* dated October 31, 2006, the semicircular configuration of Applicant's gripping member 69 does have several advantages over prior pull rings and pull tabs. Such advantages nullify the asserted conclusion of obviousness.

Gripping member 69 is specifically adapted to facilitate a user in gripping and pulling gripping member 69 when removing frangible membrane 63 from fitment 32. *See, e.g.,* present application, paragraph no. 55. For example, gripping member 69 is flexible and allows the user to straighten semicircular segment 70 to some degree allowing the segment to better confirm to the contour of the user's finger. *See* present application, paragraph no. 60. Such a configuration is particularly useful in the case of smaller fitments (e.g., 28 mm and smaller fitments), particularly when the gripping member is located within the spout of the fitment. Indeed, Murayama more particularly relates to "**wide-mouthed containers**" (Column 1 lines 7-11).

With such smaller fitments, the spout opening of the fitment is small and the pull tab or pull ring must be even smaller. In the case of a pull tab, the tab must be sufficiently narrow to allow one to insert one's finger into the spout, around and under the tab. In the case of a pull ring,

the outer diameter of the pull ring is smaller than the inner diameter of the spout, and the inner diameter of the pull ring is smaller still. Accordingly, it may be difficult for a user, particularly a user with larger fingers, to insert their fingers through the pull ring of a smaller fitment.

Furthermore, in the manufacturing process, a closed ring or tab as disclosed by Hicks requires a significantly more complex molding design. A flexible semicircular/free end configuration of gripping member 69 may simplify the manufacturing process by providing a shape that more readily de-molds. *See*, e.g., present application, paragraph no. 65. For example, the semicircular configuration of gripping member 64 breaks open the loop of conventional pull rings and allows the gripping member to bend and flex out of the way as mold tooling retracts. The forces involved as the gripping member of the present invention flexes and snakes its way out of a mold cavity is likely to be substantially less than the compressive and/or expansion forces involved in demolding a fitment having a closed ring as tooling is removed from the closed ring and/or vice versa. In the case of demolding a closed ring, the higher compressive and/or expansion forces involved may in some cases be sufficient to damage the frangible membrane.

In addition, of particular importance in this application, the configuration of the semicircular member disclosed in independent claims 1 and 32 maximizes clearance of a finger inserted inside the inner diameter of the spout. Although a ring shape as taught by Hicks aids in pulling the member, a ring shape also limits the space between the inner diameter of the spout opening and the gripping member. Thus, a user can more easily reach into the spout opening and grasp the gripping member.

Request For Withdrawal of Finality

Applicant also respectfully submits that the present Office Action has prematurely made a final rejection of claims. Pursuant to MPEP § 706.07(c), the Applicant hereby requests the Examiner to withdraw the finality of the present Office Action.

Applicant notes that the original claim 1 herein made reference to the gripping member having a semicircular member having first and second terminal ends, the first end being connected to the frangible membrane adjacent the line of weakness and the second end being remotely located from the first end. The new grounds of rejection advanced in the present Office Action are based upon the newly cited and applied art reference of Murayama which is now combined with the Hicks reference under 35 U.S.C. 103(a) to assertedly supply the foregoing semicircular member as originally present in claim 1.

Indeed, prior to the present Office Action, over 60 references have been made of record herein and none disclose the semicircular member of present invention. Applicant has previously respectfully requested citation of a reference in support of the prior Office Action positions on this issue per M.P.E.P. § 2144.03. The present Office Action now newly cites Murayama in apparent response thereto and Applicant, in this AMENDMENT AND REPLY, first comments thereon.

Applicant respectfully submits that the considerations set forth at MPEP § 706.07 support a withdrawal of the finality of the present Office Action.

Allowable Subject Matter

The Examiner has previously indicated that claims 15-23 are allowed. The present Office Action at page 6, item 9, indicates claims 15-22 are allowed, an apparent typographical error since claim 23 directly depends upon allowed claim 22 and indirectly depends upon allowed claim 15.

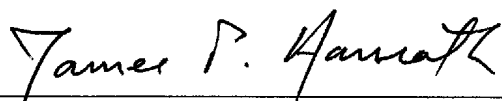
Conclusion.

For at least the foregoing reasons, Applicant respectfully submits that the Hicks and Murayama patents, taken individually or combined with each other or with the Wise et al. or Guglielmini et. al. patents, do not render obvious independent claims 1 or 32. Hence all remaining pending claims are belived allowable due to their direct or indirect dependency on such independent claims.

Additionally, the Wise and Guglielmini patents, which both fail to teach the semicircular member of independent claims 1 and 32, do not make up for the foregoing deficiencies of the Hicks amd Murayama patents. The Wise patent teaches away from Applicant's open semicircular gripping member in that pull out tab 68 is a flat tab. The Guglielmini patent also teaches away from such a configuration in that pulling ring 12 is a closed ring, as evidenced by the cross-hatching in FIGS. 2 and 4

All of the stated grounds of rejection have been properly traversed, accommodated, or rendered moot. Applicant respectfully requests that the Examiner reconsider all presently outstanding rejections and that they be withdrawn. It is submitted that the application is now in condition for allowance and an early and favorable action to that end is requested. If any questions or issues remain, the resolution of which the Examiner feels would be advanced by a telephonic conference with Applicant's attorney, she is invited to contact the undersigned at the telephone number noted below.

Respectfully submitted,



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